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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 200

RECONSTRUCTION FINANCE CORPORATION,
PETITIONER

v.

J. G. MENIHAN CORP., J. G. MENIHAN, SR.,
AND J. G. MENIHAN, JR.,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 5–10) is reported in 29 F. Supp. 853. The majority opinion of the Circuit Court of Appeals (R. 14–17), and the dissenting opinion of Judge Clark (R. 17–19), are reported in 111 F. (2d) 940.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on May 23, 1940 (R. 19). The petition for a writ of certiorari was granted on October 14,

1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May respondents have court costs and an allowance, apparently for attorney's fees, taxed against Reconstruction Finance Corporation, a corporate instrumentality of the United States?

STATUTES INVOLVED

Section 4 of the Reconstruction Finance Corporation Act, c. 8, 47 Stat. 6; U. S. C., Title 15, Sec. 604, provides in part:

> The corporation * * * shall have * * * power * * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal * * *.

A pamphlet of laws entitled "Reconstruction Finance Corporation Act, as Amended, and Other Laws and Documents Pertaining to Reconstruction Finance Corporation, October 1939 (Revised)," is filed with this brief.

STATEMENT

Pursuant to the provisions of Section 5d of the Reconstruction Finance Corporation Act, as amended, Reconstruction Finance Corporation (hereinafter called RFC) in 1934 made a loan to the Menihan Company upon the security of certain collateral, which included trade-marks owned by

the company (R. 5). Upon the bankruptcy of the company in December 1936, RFC acquired title to the collateral at a trustee's sale (R. 5–6). Thereafter RFC brought proceedings to enjoin J. G. Menihan Corp., which was formed in January 1937, J. G. Menihan, Sr., who had been president of the Menihan Company and became president of the respondent corporation upon its formation, and J. G. Menihan, Jr., from trade-mark infringement and unfair competition (R. 3, 5–6).

After trial the District Court dismissed RFC's bill on the merits (R. 2–3, 4). However, it refused to tax court costs against RFC (R. 2–3, 4) and denied respondent's application for an additional allowance (apparently for attorney's fees[1]) (R. 3, 4, 19), on the ground that "the imposition of costs against the plaintiff, a governmental agency, is not permitted by law" (R. 2–3, 4, 10).

Respondents thereupon appealed to the Circuit Court of Appeals from so much of the orders of the District Court as denied their application for costs and for an additional allowance (R. 1–2, 4). The court below (Clark, J., dissenting) held that the District Court had power to tax costs and additional allowances against RFC, and reversed the orders of the District Court appealed from (R. 14–

[1] The record does not specifically show that the additional allowance sought was for attorney's fees. But, in his dissenting opinion, Judge Clark states that to be the fact (R. 19).

19). The Circuit Court of Appeals also taxed costs in that court against RFC (R. 17, 19).

SPECIFICATIONS OF ERRORS TO BE URGED

The court below erred:

1. In holding that court costs and additional allowances may be taxed against RFC.

2. In taxing costs in that court against RFC.

3. In reversing the orders of the District Court appealed from.

SUMMARY OF ARGUMENT

The power of the inferior federal courts to allow and tax costs rests, so this Court has stated, "upon usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson,* 253 U. S. 300, 316; *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 164–166. Yet this usage under a settled line of decisions does not authorize the taxation of such costs against the Government. Rather, in the absence of a specific waiver of its traditional immunity from such costs, supplementing its consent to suit, the implication is plain that Congress intends that such costs may not be taxed against the Government.

This settled construction of acts of Congress consenting to suit against the Government is equally applicable to the Act authorizing RFC "to sue and be sued" in any court of competent jurisdiction. An examination of the powers, duties, and responsibilities of RFC discloses that they are of the type

traditionally associated with Government. In a real sense the activities of RFC are the activities of the United States. The choice of a corporate form of agency to carry out the ends of Government may, it is true, be indicative of an intention that RFC shall be amenable to the judicial process as are other governmental agencies in corporate form. Yet, this is not to solve the problem here, but merely to state it. The motives which induce Government to carry on its activities through a corporate form are not relevant to the problem raised in this case. And the climate of dominant opinion, together with the adjudicated cases, concerning the taxation of court costs against Government corporations, tend to support our position, insofar as they look in any direction. In these circumstances, therefore, the character of the functions performed by RFC would appear to be the determining factor. It is just such evidence as this Court recognizes in other legal relations "when realities become decisive." *Inland Water Ways Corp.* v. *Young,* 309 U. S. 517, 523–524; *Clallam County* v. *United States,* 263 U. S. 341; *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. 415. The closest analogy which Congress might be thought to have in mind when it created RFC, and authorized it "to sue and be sued," is the group of statutes consenting, without more, to suits against the Government. It follows that RFC should not be taxed with court costs.

And, in any event, the additional allowances, apparently for attorneys' fees, should not have been charged against RFC. These are in the nature of penalties and are plainly not to be laid against a Government corporation.

ARGUMENT

The issue in this case is narrow: whether RFC may be held liable for court costs and for attorney allowances. The United States by long and settled tradition is immune from this liability and the question here is simply whether Congress in creating RFC stripped it of this immunity. This, of course, is simply a question of the intent of Congress.

Congress has not in terms specified the applicable rule. The problem before the Court, therefore, would seem to be answered in terms of the rule as to costs which Congress thought would be applicable in its silence.

A. AUTHORITY OF THE COURTS TO ENTERTAIN A SUIT, IN THE ABSENCE OF A SPECIFIC STATUTORY WAIVER OF IMMUNITY FROM COURT COSTS, DOES NOT COMPREHEND THE AUTHORITY TO TAX SUCH COSTS AGAINST THE GOVERNMENT

The power of the inferior[2] federal courts to allow and tax court costs appears not to have been conferred directly, but only recognized by implica-

[2] Rule 32 (f) of this Court, 306 U. S. 711, reads: "No costs shall be allowed in this Court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court."

tion, in the First Judiciary Act. Act of September 24, 1789, 1 Stat. 83. It rests, so this Court has said, upon "usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson,* 253 U. S. 300, 315–319; *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 164–166. Yet this usage under a settled line of decisions does not permit the rendition of a judgment or decree for such costs against the United States, whether appearing as plaintiff [3] or as defendant. E. g., *United States* v. *Worley,* 281 U. S. 339, 344; *United States* v. *Chemical Foundation,* 272 U. S. 1, 20–21; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 296. As early as 1817 Chief Justice Marshall observed that "the United States never pay costs." *United States* v. *Barker,* 2 Wheat. 395. See also *United States* v. *LaVengeance,* 3 Dall. 297; *United States* v. *Hooe,* 3 Cranch 73; *United States* v. *Ringgold,* 8 Pet. 150.

[3] There is no exception to the rule of immunity where the United States, as plaintiff, sues a citizen in its own courts. A possible ambiguity on this score, arising from the decision in *United States* v. *The Thekla,* 266 U. S. 328, 339–340, 341, has been set at rest by subsequent decisions of this Court. *The Thekla* turns upon a doctrine applicable only to suits in admiralty for damages arising from collision. See *United States* v. *Shaw,* 309 U. S. 495, 502–503; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 134n. On several occasions this Court has denied that the inferior courts have power to enter a judgment for court costs against the United States in suits brought by the United States as plaintiff. E. g., *United States* v. *Chemical Foundation,* 272 U. S. 1, 20–21; *United States* v. *Boyd,* 5 How. 29, 50; *United States* v. *Hooe,* 3 Cranch 73, 92.

The rule, of course, is susceptible of statutory qualification. Congress has in some circumstances specifically authorized an allowance for the costs of suit to be included in a decree against the United States.[4] But only Congress has power to waive or qualify the Government's immunity. And this waiver of the Government's immunity must be accomplished by specific direction of Congress. As this Court ruled in *United States* v. *Chemical Foundation, supra,* 20–21:

> The general rule is that, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses. * * * Congress alone has power to waive or qualify that immunity.

Accordingly, in the absence of specific statutory authority, there is no doubt that a judgment for costs against the United States is beyond the power of the inferior federal courts. *United States* v. *Worley, supra,* at 339; *United States* v. *Chemical*

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[4] E. g., Act of March 9, 1920, 41 Stat. 525, 46 U. S. C. § 743: "A decree against the United States or such corporation may include costs of suit," *James Shewan & Sons, Inc.*, v. *United States*, 267 U. S. 86, 87; Judicial Code § 152, 28 U. S. C. § 258: "If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue," *United States* v. *Harmon*, 147 U. S. 268; *United States* v. *Cress*, 243 U. S. 316; *Oregon & Cal. R. R. Co.* v. *United States*, 243 U. S. 550, 562. See also Revised Statutes § 989, 28 U. S. C. § 842. Compare Act of June 19, 1934, 48 Stat. 1064.

Foundation, supra, at 20–21; *Pine River Logging Co.* v. *United States, supra,* at 296; *Stanley* v. *Schwalby,* 162 U. S. 255, 272; *United States* v. *Boyd,* 5 How. 29, 50; *The Antelope,* 12 Wheat. 546, 548.[5]

Each case laying down this rule governing the taxation of court costs, it is to be observed, was itself decided in the light of an express statutory authority to bring an action against the United States in a court of competent jurisdiction. It follows, under the practical construction accorded to acts of Congress for over a century, that action by Congress waiving immunity and consenting to suit does not give rise to an inference that costs may be taxed against the Government. Where Congress intends to permit the taxation of costs against the Government it must speak in no uncertain terms. See *James Shewan & Sons, Inc.* v. *United States, supra,* at 87; *Carlile* v. *Cooper,*

[5] The origin of the rule that the Government is immune from court costs is not entirely clear. It has been recognized as having its source in the prerogative of the sovereign. *United States* v. *Davis,* 54 Fed. 147, 153 (C. C. A. 8th); *Marine* v. *Lyon,* 62 Fed. 153, 154–155 (C. C. A. 4th). And court costs have generally been characterized as a substantive liability, similar to taxes, that may be incurred by the United States only where its immunity is specifically waived. E. g., *United States* v. *French Sardine Co.,* 80 F. (2d) 325, 326 (C. C. A. 9th); *Marine* v. *Lyon, supra,* at 154–155; *Erwin* v. *United States,* 37 Fed. 470, 488 (D. C.); *Fargo* v. *Helmer,* 43 Hun. (N. Y.) 17, 19. Compare *Clallam County* v. *United States,* 263 U. S. 341, 345. The United States, even though not taxable with costs, may be allowed costs. *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 296.

64 Fed. 472, 475 (C. C. A. 2d). In the absence, therefore, of a specific waiver of its immunity from costs, supplementing its waiver of immunity from suit, it is clear that Congress intends that no judgment against the Government for court costs shall be rendered.*

B. RFC IS A BRANCH OF THE UNITED STATES GOVERNMENT

1. We do not, of course, urge that every corporation created by Congress enjoys the immunity from court costs retained by the United States when it authorizes suits against itself. For, as this Court has recognized, there is a marked distinction between "the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account" and the case of a corporation which acts as a part of the Government, and exists in corporate form "only for the convenience of the United States to carry out its ends." *Clallam County* v. *United States*, 263 U. S. 341, 345. The purposes and function it performs, or its legislative history, may well indicate that such a federally chartered corporation designed to serve in part private or nongov-

* Rule 54 (d) of the Rules of Civil Procedure, 308 U. S. 732–733, whatever its other effects on equity practice as to costs, plainly does not modify the existing practice as to the imposition of costs against the United States, its officers, and agencies. Notes of the Advisory Committee; Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064.

ernmental ends [1] was intended to be as completely amenable to the judicial process as is any private corporation operating for the benefit of its shareholders. *Clallam County* v. *United States, supra,* at 345; *F. H. A.* v. *Burr,* 309 U. S. 242, 245. Compare *Sloan Shipyards* v. *Emergency Fleet Corp.,* 258 U. S. 549. See also *United States* v. *Barker,* 12 Wheat. 559; and *Cooke* v. *United States,* 91 U. S. 389, 396, cited in *United States* v. *Summerlin,* 310 U. S. 414, 416.

2. But the corporations which are a part of the Government itself, and carry on only the functions of the United States, stand on a quite different footing. They are created simply to do the Government's work. This Court has settled that the Government corporations which do exclusively the work of the United States are, equally with the other branches of the Government, performing "essential governmental functions," and that there is no difference as to essentiality in the functions of the United States. *Pittman* v. *Home Owners' Loan*

[1] Examples may perhaps be found in certain railroad corporations, in the national banks, and also in the American Legion, 41 Stat. 284, 285, the Boy Scouts of America, 39 Stat. 227, or the Grand Army of the Republic, 43 Stat. 358, 359. *Luxton* v. *North River Bridge Co.,* 153 U. S. 525; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Thomson* v. *Pacific Railroad,* 9 Wall. 579. See also *Bank of the United States* v. *Planters' Bank of Georgia,* 9 Wheat. 904. There, in addition, unlike the federal Government, the State was exercising proprietary powers. *Helvering* v. *Therrell,* 303 U. S. 218.

Corp., 308 U. S. 21, 32; *Graves* v. *O'Keefe*, 306 U. S. 466, 477; *State Tax Commission* v. *Van Cott*, 306 U. S. 511.[8] The corporate form is adopted only as a matter of administrative efficiency, e. g., to secure flexibility of operations and convenience in such matters as annual appropriations and preaudits. *United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1; 6–8. These consideration have no relation to the governmental immunities of the United States and its agencies. See *Clallam County* v. *United States*, 263 U. S. 341; *Graves* v. *O'Keefe*, 306 U. S. 466, 477. As this Court said in *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524:

> The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. * * * The true nature of these modern devices for carrying out governmental functions is recognized in other legal relations

[8] Similarly, it has often been recognized that RFC itself is a part of the United States, performing its governmental functions. Its purpose "is not profit to the government" but "the rehabilitation of finance and industry and commerce." *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209, 211. See, also, *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *Langer* v. *United States*, 76 F. (2d) 817, 823. See, also, *RFC* v. *Central Republic Trust Co., et al.*, 17 F. Supp. 263; *United States* v. *Arthur*, 23 F. Supp. 537; *United States* v. *Freeman*, 21 F. Supp. 593; *R. F. C.* v. *Graydon*, 16 F. Supp. 765; *R. F. C.* v. *Krauss*, 12 F. Supp. 44.

> when realities become decisive. * * * * The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses. * * *

The ultimate question of Congressional intention is whether Congress, when it consented to suit against RFC, intended to waive the immunity from liability for costs which attaches to other branches of the Government. This inquiry is aided if one looks at the actual corporation which Congress created and at the duties which it was to perform.

The Reconstruction Finance Corporation Act of January 22, 1932, provides that RFC's capital stock of $500,000 is to be subscribed exclusively by the United States, its sole stockholder (§ 2).[9] Its obligations, which are fully and unconditionally guaranteed by the United States, are issued and marketed through the Secretary of the Treasury and are treated as public debt transactions (§ 9). It is authorized to act as a depository of public monies and as financial agent of the United States and in turn is authorized to deposit its monies with the Treasury (§§ 7, 12). Upon its liquidation, either by itself during the first fifteen years (§ 4) or thereafter by the Secretary of the Treasury

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[9] The references are to the Reconstruction Finance Corporation Act, as amended, save where other sources are specifically noted. The provisions of this Act, together with other relevant statutes, are set forth in the pamphlet of laws filed with this brief.

(§ 13), any surplus is to be carried into the miscellaneous receipts of the Treasury (§ 13). Its management is entrusted to a Board of Directors appointed, as are other officers of the United States, by the President by and with the consent of the Senate (§ 3).[10] See also 75 Cong. Rec. 1916. And recently, for reasons of economy and efficiency, it was grouped under a Federal Loan Agency which was to supervise the administration and be responsible for the coordination of the functions and activities of various governmental lending agencies. A quarterly report of its operations is made to Congress (§ 15). Administrative expenses are subject to the annual appropriation acts (see *e. g.*, First Deficiency Appropriation Act, Fiscal Year 1936). And it has been given the franking privilege (§ 4).

The powers conferred from time to time upon RFC disclose both the complexity of the economic problems which the United States, through RFC and other agencies, intended to alleviate and the reliance placed by Congress upon RFC as the appropriate agency through which to act.[11]

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[10] The original Board consisted of the Secretary of the Treasury, the Governor of the Federal Reserve Board, the Farm Loan Commissioner, and four other Directors; it consists now of five members, no more than three of whom may be members of the same political party and no more than one from any single Federal Reserve District (§ 3).

[11] The intimate link between RFC and the fiscal powers of Congress becomes more apparent when one considers the extent to which currency has been supplemented by credit

RFC is authorized to make loans and otherwise give financial aid in a wide variety of situations, "to aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products" (§ 5). A description of some of the powers conferred to meet these varied conditions is set forth in the margin for the information of the Court.[12]

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instruments as a medium of exchange, and the inability of Congress successfully to exercise its powers to tax and to borrow in a paralyzed financial community. See Hearings before the House Banking and Currency Committee on H. R. 5357, 74th Cong., 1st Sess., p. 213; Report of the Comptroller of Currency in 1919, Vol. 2, p. 36. In addressing itself to this distressed financial situation and in taking measures to protect and preserve financial agencies previously created by Congress, RFC is exercising traditional functions of the United States. Compare *Westfall* v. *United States*, 274 U. S. 256; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416; *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *McCulloch* v. *Maryland*, 4 Wheat. 316.

[12] RFC may, with the approval of the Interstate Commerce Commission, make loans to railroads engaged in interstate commerce "to aid in the financing, reorganization, consolidation, maintenance, or construction thereof" (§ 5). It is authorized to make loans to "any business enterprise when capital or credit, at prevailing rates for the character of loan applied for, is not otherwise available," "for the purpose of maintaining and promoting the economic stability of the country or encouraging the employment of labor" (§ 5d); to States for relief of destitution (§ 1 of Emergency Relief and Construction Act of 1932); and to aid in the relief of disasters caused by floods, tornadoes, cyclones, earthquakes, or conflagrations (§ 201 (a) (6), *id.*, as amended). It is authorized to make loans to States, municipalities, and political subdivisions and other public agencies "to aid in financing projects authorized under federal, state, or municipal law

More recently RFC was authorized to assist in the national defense program by organizing corporations and financing them and existing corporations in producing and acquiring strategic materials and in equipping and expanding plants for the production of needed supplies (§ 5d).

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which are self-liquidating in character" (§ 201 (a), *id.*; see also § 5d); to make loans, "in order that the surpluses of agricultural products may not have a depressing effect upon current prices of such products * * *, for the purpose of financing sales of such surpluses in the markets of foreign countries * * *" (§ 201 (c), *id.*), and "to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States" (§ 201 (d), *id.*). It can also make loans to enable drainage, levee, and irrigation districts and similar public bodies, to reduce and refinance their outstanding indebtedness incurred in connection with projects "devoted chiefly to the improvement of lands for agricultural purposes" (§ 36 of the Emergency Farm Mortgage Act of 1933).

RFC is likewise authorized to subscribe for the preferred stock, capital notes, and debentures of national banks and state banks and trust companies if, in the opinion of the Secretary of the Treasury, such institutions are "in need of funds for capital purposes" and if the Secretary "with the approval of the President" requests such a purchase (§ 304 of the Act of March 9, 1933, as amended, c. 1, 48 Stat. 6). It can subscribe for preferred stock or capital notes of insurance companies under similar conditions (Act of June 10, 1933, as amended, c. 55, 48 Stat. 119–122). It can also subscribe for the stock of national mortgage associations or of mortgage loan companies, trust companies, savings and loan associations, and other similar financial institutions organized under the laws of the United States or of any State "to assist in the reestablishment of a normal mortgage market" (§ 5c).

In addition to these discretionary financial powers RFC was directed by Acts of Congress to allocate and transfer various amounts to other branches of the Government. In this respect it acts in a capacity similar to that of the Treasury of the United States. Thus, for example, it was directed to make monies available to the Secretary of Agriculture (§ 2, and Act of February 4, 1933), to the Governor of the Farm Credit Administration (§ 5 of Farm Credit Act of 1933), to the Secretary of the Treasury (§ 2), and to the Farm Loan Commissioner (§ 32 of the Emergency Farm Mortgage Act of 1933), and was authorized to supply the funds to enable the Secretary of the Treasury to subscribe for the capital stock of the Home Owners' Loan Corporation on behalf of the United States (§ 4 of Home Owners' Loan Corporation Act of 1933). RFC was also directed to make available a substantial portion of its unobligated funds, if requested by the President, to be applied for relief purposes (Title 2, Emergency Appropriation Act, fiscal year 1935; Emergency Relief Appropriation Act of 1935).[12]

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[12] That RFC's activities are limited only to the needs and objectives of the United States is also demonstrated by the provisions of the statutes extending its lending powers (e. g., Act of Jan. 26, 1937, as amended: "*Provided*, That in order to facilitate the withdrawal of the credit activities of the Corporation when from time to time during such period the President finds * * * that credit for any class of borrowers to which the Corporation is authorized to lend is sufficiently available from private sources to meet legitimate

From the foregoing, it is apparent that RFC's activities, while they have been manifold, have been carried on exclusively in accordance with the needs of the United States and pursuant to purposes and restrictions that bear no relation to those governing the activities of private business organizations.[14]

C. RFC'S CORPORATE FORM AND THE SUE-AND-BE-SUED CLAUSE DO NOT CONSTITUTE A CONSENT TO THE TAXATION OF COSTS

1. The United States, as we have shown (pp. 6–10, *supra*), does not subject itself to liability for costs when it authorizes suits against itself, and RFC in every legal and practical sense is a part of the United States (pp. 10–18, *supra*). It should follow, without more, that RFC is not liable for

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demands upon fair terms and rates, the President may authorize the directors to suspend the exercise by the Corporation of any such lending authority for such time or times as he may deem advisable."

[14] By way of example, the dividend rate on banking associations' preferred stock purchased by RFC has from time to time been reduced by RFC in order that the funds it supplies might accomplish their purpose more effectively. See testimony of Mr. Jesse H. Jones before House Committee on Banking and Currency on H. R. 11047, 74th Cong., 2d Sess., p. 2. Pursuant to the statutory provisions, and as a matter of policy generally, loans are made only when credit, at prevailing rates for the character of loan, is not available from private sources. §§ 5, 5d; testimony of Mr. Jesse H. Jones before House Committee on Banking and Currency on H. R. 4240, 74th Cong., 1st Sess., p. 4. The loan involved in this case was made pursuant to Section 5d conferring authority to act "For the purpose of maintaining and increasing the employment of labor * * *."

costs simply because Congress has authorized suits against it. Certainly, we think, no contrary implication is to be found which speaks with a clarity sufficient to overcome this natural syllogism which must have been in the mind of Congress when it created and authorized suits against RFC.

The argument to the contrary must rest only upon the choice of a corporate form through which the RFC is to carry on the work of the Government and the power given the RFC "to sue and be sued." Plainly enough, neither circumstance amounts to a waiver of the Government's immunity from costs. Such immunity is specific and is not waived unless Congress "has spoken in no uncertain terms" *Carlile* v. *Cooper,* 64 Fed. 472, 475 (C. C. A. 2d).

2. Indeed, to refer to the corporate form is not to solve the problem here, but merely to state it. Under the analysis indicated by this court in *Keifer & Keifer* v. *RFC and RACC,* 306 U. S. 381, the implications of use of the corporate form must be measured against "dominant contemporaneous opinion" (p. 389) and the judicial background of litigated cases (p. 391). Neither approach suggests any substitute for the specific authority necessary to exact costs from the Government.

The mere choice of the corporate form of organization should not outweigh the character of the functions and responsibilities imposed by Congress upon RFC (pp. 13–18, *supra*). It is this lat-

ter evidence that this Court has recognized in other legal relations "when realities become decisive." See *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524; *Clallam County* v. *United States*, 263 U. S. 341. No reason is apparent why such evidence should not be equally decisive here. It follows that RFC, no more than other branches of the Government whose traditional functions it performs, cannot be taxed with court costs.

There is now and was in 1932 no "climate of opinion" favoring the taxation of court costs against the Government or against its corporate agencies such as RFC. Contrast *Keifer & Keifer* v. *RFC and RACC*, *supra*, at 392–394. Not one of the forty-odd corporations established by Congress during the past two decades for what, in a broad sense, are governmental ends (see list in *Keifer* case, *supra*, at 290–291n.) was specifically subjected to liability for court costs.[15]

The sue-and-be-sued clause, designed as it was to make judicial procedure available to and against RFC on its transactions, neither by its terms nor by its connotations includes the further consequence of liability for costs. The case at hand, in this respect, differs markedly from *F. H. A.* v. *Burr*, 309 U. S. 242. In that case this Court was determining neither the class nor the amount of the liability for which Congress had consented that its agency should be held responsible, but merely

[15] They are listed in the *Keifer* case, *supra*, at 390–391n. The lists include corporations which are a part of the Government as well as those which serve private or unofficial ends.

the existence of alternative remedies open to the employee and his creditors in order to enforce a conceded liability for wages earned. There was no doubt there that the same claim could have been pressed successfully by the employee who earned the wages owing; the question was whether this same claim could be asserted by his creditor, or whether, instead, a well-known form of civil process must be excluded from a sue-and-be-sued clause.[16] Here, the issue is broader than any delimitation of the types of procedures contemplated by a sue-and-be-sued clause. For, under an established line of decisions (pp. 7–9, *supra*) and as a practical matter, liability for costs is a separate substantive liability requiring additional and specific authority in order to fix it upon the Government.

Nor is there any line of cases that implied that RFC would be held liable for costs because of the corporate form or the sue-and-be-sued clause. On the contrary, all the cases raising this precise issue,

[16] The decision in *F. H. A.* v. *Burr*, *supra*, was based upon the express language of the statutory consent to sue a particular agency; this Court observed that the words "sue and be sued" in their normal connotation embraced garnishment proceedings. The reference to the activities of the Federal Housing Administration was made merely for the purpose of determining whether the consent to suit should be narrowed to exclude by implication a particular and well-recognized type of remedy. It was with respect to the activities of the Federal Housing Administration that the case of *United States* v. *Summerlin*, *supra*, refused to permit the defense of a statute of limitations to be raised, where, as here, Congress has not expressed its intention in specific terms.

save only the decision below, have held that corporations performing governmental functions are not liable for costs. See *Federal Deposit Insurance Corp.* v. *Barton*, 106 F. (2d) 737 (C. C. A. 10th); *Federal Deposit Insurance Corp.* v. *Casady*, 106 F. (2d) 784 (C. C. A. 10th). See also *National Home* v. *Wood*, 81 F. (2d) 963 (C. C. A. 7th), affirmed, 299 U. S. 211, 212. Even with prophetic vision, Congress could not have supposed when it created RFC that liability for court costs would be predicated either upon the corporate form of the RFC or upon the sue-and-be-sued clause.

3. It is not sufficient to say, as did the court below, that costs are merely an incident to the judgment contemplated by the sue-and-be-sued clause. It is true enough that costs *if allowed* are an incident to judgment. Cf. *The Baltimore*, 8 Wall. 377, 390. But this throws no light upon whether or not they should be allowed. The many cases dealing with judgments against the United States (*supra*, pp. 7–9) show that costs are in no sense an inevitable incident of a judgment. The precise argument has been made and rejected with respect to costs urged to be incident to judgments against the United States. *United States* v. *French Sardine Co.*, 80 F. 2d) 325, 326; *United States* v. *Davis*, 54 Fed. 147, 153. It should have no more weight here.

The court below relied on the *Keifer* and *Burr* cases and on *United States* v. *Shaw*, 309 U. S. 495, to demonstrate that permission to sue an instru-

mentality of the United States should be liberally construed and that at times the Government's immunity must be affirmatively conferred by Congress if it is to be found. Those cases are not opposed to the contentions here advanced since they involved the question whether the United States and its instrumentalities were amenable to judicial process of one sort or another and were concerned with limiting legal irresponsibility on the transactions for which the instrumentalities were created. In the instant case the question is whether a particular substantive liability (see *supra*, p. 9n) may be imposed and a waiver of such immunity must be unmistakable. Cf. *Clallam County* v. *U. S.*, *supra*; *Munro* v. *United States*, 303 U. S. 36.[17]

4. The taxation of costs against RFC in the Circuit Court of Appeals for the Second Circuit raises no additional problems. The considerations mentioned in the course of our argument are equally applicable to all the inferior federal courts. Neither the district courts nor the circuit courts of appeals have been authorized by statute to tax costs against the Government or its corporate agencies.

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[17] *Continental National Bank* v. *Rock Island Railway*, 294 U. S. 648, is not opposed. The question there was one of statutory construction and this Court held that RFC was not entitled to a preferred position in bankruptcy proceedings. A similar ruling had been given theretofore with respect to loans by the United States that did not involve a corporate instrumentality. *United States* v. *Guaranty Trust Co.*, 280 U. S. 478. Nor is *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, opposed. In that case the Fleet Corporation was organized under the laws of the District of Columbia and the general power to sue and be sued conferred

Revised Statutes, Sec. 1001, as amended June 19, 1934, 28 U. S. C., Supp. V., Sec. 870, does not authorize the taxation of the costs on appeal against such agencies.[18] The question whether court costs are taxable in cases in which the United States or its agencies are parties is plainly and in specific terms left by this Act, as amended, to other provisions of law. Indeed, it supports the inference that the United States and corporations all the stock of which is owned by the United States shall, in the absence of a specific statute to the contrary, be treated alike with respect to court costs.[19]

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by that law and by its charter was not restricted by Congress. Such a case is manifestly different from one involving a federally chartered corporation organized exclusively for governmental purposes. See *supra*, p. 10–13.

[18] It provides:

"Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the Government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

[19] Attention may be called to Rule 29 of the Rules of the Circuit Court of Appeals for the Second Circuit, which provides in part:

"4. Neither of the foregoing sections [i. e., providing for allowance of costs] shall apply to cases where the United States are a party; but in such cases no costs shall be allowed

D. THE ADDITIONAL ALLOWANCES MAY NOT IN ANY EVENT BE TAXED AGAINST RFC

A word should be added with respect to the additional allowances, presumably for attorney's fees (see R. 3, 4, 19), sought by the Menihan group. The reasons just advanced to support our position that costs are not taxable against RFC are, of course, equally applicable to such allowances. But there are other grounds militating most strongly against the decision that the District Court has power to tax additional allowances against RFC.

First, it should be noted, the claim of the Menihan group to these allowances is not based upon the establishment of a fund in which others share through its efforts. Nor was the practical equivalent of such a fund created for the benefit of others. Compare *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164–166, and authorities cited; *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 744. The facts here show that the Menihan group was simply defending an action by RFC to enjoin trade-mark infringement and unfair competition.

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in this court for or against the United States, except where otherwise provided by statute."

As we have seen (*supra*, pp. 10–18), RFC is a branch of the United States Government, and it would follow that the quoted provision applies to it as well as to any other branch of the United States Government. Even if the statutory authority to sue and be sued could be said to *permit* the imposition of costs, there would not be present the explicit statutory provision as to costs contemplated by Rule 29. Cf. Rule 54 (d) of the Federal Rules of Civil Procedure.

Even where a fund is for all practical purposes created for the benefit of others, allowances "as between solicitor and client" are "appropriate only in exceptional cases and for dominating reasons of justice." *Sprague* v. *Ticonic Bank, supra,* at 167. And in the normal case such allowances would be taken out of the fund. *Rude* v. *Buchhalter,* 286 U. S. 451, 461; *United States* v. *Equitable Trust Co.,* 283 U. S. 738, 744. Here, quite to the contrary, allowances are sought to be taxed directly against RFC, presumably on the ground that RFC brought this suit to protect property of which the United States is the sole beneficial owner without just cause.

There may be cases which permit allowances "as between solicitor and client," even where no fund has been created, on the ground that the litigation is wholly baseless and unwarranted. But, if they exist, they represent a departure from the general rule that no such allowances are given. *Kansas City Southern Ry.* v. *Trust Company,* 281 U. S. 1, 9–11, reversing 28 F. (2d) 233, 240–246 (C. C. A. 8th); *Rude* v. *Buchhalter,* 286 U. S. 451, 459–461. And, in any event, such exceptional allowances must have been outside the contemplation of Congress when it created RFC and made it amenable to suit. They clearly are in the nature of penalties and Congress surely cannot be assumed to have subjected RFC to penalties. *Missouri Pac. R. R.* v. *Ault,* 256 U. S. 554, 563–565.

CONCLUSION

For the reasons set out above, it is respectfully submitted that the decision of the court below should be reversed.

FRANCIS BIDDLE,
Solicitor General,
EDWIN E. HUDDLESON,
Attorney.
CLAUDE E. HAMILTON,
General Counsel,
CLIFFORD J. DURR,
Assistant General Counsel,
HANS A. KLAGSBRUNN,
Counsel,
Reconstruction Finance Corporation.

DECEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940